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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1940

JAMES E. O'CONNOR, et al.,

Appellants,

vs.

SAN FRANCISCO POLICE COMMISSION, et al.,

Appellees.

On Appeal from the California Court of Appeal, First Appellate District

Jurisdictional Statement

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OCTOBER TERM, 1978

No. .....

JAMES E. O'CONNOR, et al.,

Appellants,

vs.

SAN FRANCISCO POLICE COMMISSION, et al.,

Appellees.

On Appeal from the California Court of Appeal, First Appellate District

Jurisdictional Statement

Appellants[1] appeal from the final judgment of the California Court of Appeal, First Appellate District, Division

1. Appellants are James E. O'Connor; Samuel Alhadeff; June Alhadeff; Frank Tripoli; Herman Wikkeling; Yellow Cab Cooperative, a California cooperative corporation; Sedan Operators Cooperative, Inc., a California cooperative corporation; Rick Johansen; Changs Incorporated, a California corporation; State Cab Co., Inc., a California corporation; Luxor Cab Company, a California corporation; Veteran's Cab Company, a California corporation; Ishi's Limousine Service, Inc., a California corporation; Robert Wood; Florence Race; Jeanne Abbot; Mary Speek, individually and as Trustee under the Last Will and Testament of Emory William Speek, deceased; William G. Lazar; William J. Lazar; Mary Adams; Karin Adams; Larry Walsh; Leo Warrick; Sam Weinrob and Marilee Dalbeck. Appellees are the San Francisco

Four, dated March 6, 1979, holding that an enactment of the City and County of San Francisco known as "Proposition K" does not violate the Contract and Due Process Clauses of the United States Constitution.

OPINIONS BELOW

The opinion of the Court of Appeal, which appears in Appendix "A" hereto, is reported at 90 Cal. App. 3d 107 (1979). The unreported order denying a petition for rehearing appears in Appendix "B" hereto. The unreported order of the California Supreme Court denying a petition for hearing appears in Appendix "C" hereto.

JURISDICTION

The judgment of the California Court of Appeal was entered on March 6, 1979 and a petition for rehearing was denied on March 23, 1979. A petition for hearing was denied by the California Supreme Court on May 3, 1979.

A notice of appeal was filed in the Court of Appeal on May 8, 1979. Appendix "D", *infra*. This appeal is being docketed in this Court within ninety days from the denial of the petition for hearing in the California Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

Police Commission; Richard J. Siggins, Judith E. Ciani, Jane McKaskle Murphy, Dr. David J. Sanchez, and Burl A. Toler, as members of the San Francisco Police Commission; Charles R. Gain; City and County of San Francisco, a municipal corporation; Controller of the City and County of San Francisco, and Board of Supervisors of the City and County of San Francisco, together with the Superior Court for the City and County of San Francisco, which was the nominal Respondent in the court below.

This appeal involves two separate suits which were heard together by the California courts and disposed of by a single opinion of the California Court of Appeal. A single jurisdictional statement is being filed in accordance with Rule 15(3). References to the record below (*see* note 2, *infra*) are to the record in ***O'Connor v. Superior Court***, Calif. Ct. App., 1 Civ. No. 44865.

QUESTIONS PRESENTED

1. Are taxicab permits issued by a city, which by law are irrevocable (except for cause) and freely transferable to qualified applicants, "contracts" or "property" within the Contract and Due Process Clauses of the United States Constitution?

2. Under the Contract and Due Process Clauses, may such permits be rendered nontransferable and thereafter revoked without cause or payment of compensation?

STATUTORY PROVISIONS INVOLVED

1. The measure alleged in this case to be unconstitutional, popularly known as Proposition K, is set forth in full in Appendix "E", *infra*. It amends various sections of the San Francisco Police Code.

2. Other laws, not challenged herein as unconstitutional, which are nevertheless involved in this case are set forth below:

(a) Prior to the amendment caused by Proposition K, Section 1079 of the San Francisco Police Code provided:

> "OPERATIONS OF MOTOR VEHICLES FOR HIRE. TRANSFER OF PERMITS AND LICENSES THERETO. No person, firm or corporation to whom a permit or license to operate a motor vehicle for hire is issued pursuant to this article shall knowingly lease, rent, cause or permit a person other than the permittee or a person standing in an employer-employee relationship to said permittee to operate said motor vehicle for hire nor shall any person lease, rent, or operate a motor vehicle for hire under a permit or license issued pursuant to this Article other than the permittee or a person standing in an employer-employee relationship to said permittee.
>
> All persons, firms or corporations within the purview of Section 1075 to 1081, inclusive, of this Article

shall regularly and daily operate his or its licensed motor vehicle for hire business during each day of the license year to the extent reasonably necessary to meet the public demand for such motor vehicle for hire service.

Upon abandonment of such business for a period of 10 consecutive days by an owner or operator, the Police Commission shall, after five days' written notice to the said owner or operator, direct the Police Department of the City and County of San Francisco to revoke said owner's or operator's licenses or permits, and said licenses or permits shall forthwith be revoked; provided, however, that the Chief of Police shall on written application grant to the holder of the permit permission to suspend operation of the permit for a period not to exceed 90 days in any one year, in case of sickness, death or other hardship, if in the judgment of the Chief of Police investigation discloses that the statements contained in said written application warrant such permission.

All such permits and licenses granted hereunder shall be transferable upon the consent of the Police Commission after written application shall first have been made to said Commission and upon payment of the fee required pursuant to Section 128.1 or Section 128.3, Part III, of the San Francisco Municipal Code. Any and all such certificates of public convenience and necessity, permits and licenses, and all rights herein granted may be rescinded and ordered revoked by the Police Commission for cause."

(b) Prior to the amendment caused by Proposition K, Section 1130 of the San Francisco Police Code provided:

"REVOCATION OF PERMITS The Chief of Police or the Department of Public Works, in the exercise of a sound and reasonable discretion, when the public

interest may require, may suspend or revoke any permit which they respectively have issued under the provisions of Sections 1115 to 1160, inclusive, of this Chapter, but only for good cause shown upon notice and hearing."

ASSERTION OF THE FEDERAL QUESTION

At the earliest stage of the proceedings, and at each stage thereafter, the unconstitutionality of Proposition K was asserted in the courts of California. It was raised in the Superior Court in the complaint (App. 11-12)[2] and supporting brief (*id.* 20-63); in the California Court of Appeal in the petition for writ of mandate and accompanying brief; and in the California Supreme Court in the petition for hearing. The Court of Appeal considered and expressly rejected the constitutional claims now pressed here. Appendix "A", *infra.*

STATEMENT OF THE CASE

Until July, 1978, taxicab permits issued by the City and County of San Francisco were expressly *transferable* to any qualified applicant[3] and *irrevocable* except upon a showing of "good cause shown upon notice and hearing."[4] There were 711 taxicab permits outstanding. (App. 93).

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2. The record below consists of appellate briefs and an "Appendix to Petition for Writ of Mandate" (citations to which appear as "App. ....."), which contains the trial court pleadings, evidentiary declarations and documents, and orders of the trial court.

3. San Francisco Police Code § 1079 provides:
"All such permits and licenses granted . . . shall be transferable upon the consent of the Police Commission after written application shall first have been made to said Commission and upon payment of the fee required. . . ."

4. *Id.* § 1130; *see also id.* § 1079.

The court below found that, under this statutory scheme, taxicab permits were freely transfered.[5] Appendix "A" at 4, *infra*. They acquired a substantial market value. Thus in recent years individual Appellants purchased permits from private parties at prices ranging from $9,375 to $17,250 plus a transfer fee of $1,000 payable to San Francisco. (App. 137, 140, 143, 152, 155). Indeed, San Francisco itself sold a number of permits for $7,500 each. (App. 140, 146).

In reliance on the statutory scheme, which assured both irrevocability (except for cause) and free transferability to qualified persons or firms, substantial sums were invested in permits and in the necessary capital equipment to operate a taxicab business. Appellant Yellow Cab Cooperative, for example, purchased 350 permits, taxicabs and related assets from the receiver in bankruptcy of the former Yellow Cab Company for $3.35 million. (App. 95).[6]

The rights of taxicab permit owners were eviscerated in July, 1978 when a new law—known as "Proposition K"—became effective. It accomplishes, *inter alia*,[7] the following:

5. The uncontradicted evidence, not disputed by Appellees and accepted as accurate by the Court below (*see* Appendix "A" at 4, *infra*), was that permits were routinely transferred with the approval of the regulatory authority unless "the proposed transferee ha[d] a serious criminal record or possesse[d] other characteristics making him or her unsuitable to hold a San Francisco taxicab permit." (App. 94, 141, 152). In addition, permits were routinely transferred by orders of the state and federal courts requiring transfer and sale in connection with domestic relations orders, execution sales, decrees of distribution, and bankruptcy proceedings. (App. 94). And Appellees routinely permitted permits to be used as security for various types of financing arrangements. (*Id.*).

6. The Cooperative simultaneously arranged the sale of 100 of these permits directly to other cab companies and individuals. (App. 95).

7. Other provisions of the measure regulating applications for licenses, the duty to operate and the like are, for the most part, essentially unchanged from the prior law.

First, it declares that "all taxicab permits and other vehicle for hire permits issued by the City and County of San Francisco are the property of the people of the City and County of San Francisco and shall not be sold, assigned or transferred." *Id.* § 1(a).

Second, all existing permits are effectively revoked and must be surrendered within sixty days of the effective date of the new law. *Id.* § 4(b). (This aspect of Proposition K has been stayed by the California Supreme Court until this litigation is concluded).

Third, new permits will be issued to existing permit holders upon surrender of the old ones, but the replacement permits "shall be non-transferable and non-assignable either expressly or by operation of law." *Id.* § 4(b).

Fourth, the newly issued permits will be revoked upon the death of any permit holder who is a natural person. *Id.* § 4(a), (b). In the case of a corporate permitee, the law is even more draconian: the permit will automatically become "null and void" upon the *cumulative* sale or "transfer" of 10% or more of the permitee's stock. *Id.* § 5(a). Thus, for example, the deaths of a 6% shareholder and a 4% shareholder would result in the automatic cancellation of *all* of the corporation's permits and put the corporation out of business.

Proposition K thus imperils every holder of a taxicab permit. All existing permits are to be cancelled. Replacement permits issued to existing permit holders cannot be transferred and will automatically be revoked upon the death of an individual permit holder, or of the shareholders of as little as 10% of a corporation's stock. The revocation of the permits will, of course, prevent the company from

operating; moreover, it will destroy or materially diminish the value of its operating assets.[8]

Creditors' rights are similarly frustrated. Financing arrangements based upon the security of taxicab permits are materially impaired. For example, Appellant Yellow Cab Cooperative sold 225 taxicabs and permits to its members, relying on the taxicab permits to secure payment of the deferred portion of the purchase price of $10,000. (App. 95-96; *see also id.* 149). Proposition K quite literally destroys the contractual security interests of such creditors.

Appellants include both individual and corporate permit holders, as well as holders of security interests in taxicab permits. They brought this action to restrain enforcement of Proposition K. Appellants initially sought relief in the San Francisco Superior Court, which refused to issue a preliminary injunction. (App. 229). A petition for writ of mandate and application for stay was denied by the Court of Appeal on August 22, 1978. A petition for hearing was filed in the California Supreme Court on August 24, 1978. On August 29, that court granted a partial stay of Proposition K. On October 12, it granted the petition for hearing and directed the Court of Appeal to hear the matter on the merits.

The Court of Appeal heard the case as directed. On March 6, 1979, it filed its opinion (Appendix "A"), denying the writ and upholding the constitutionality of Proposition K. A petition for rehearing was filed on March 18, 1979 and denied without opinion on March 23, 1979.

8. No elaborate proof is necessary to demonstrate to this Court that any remaining assets—the company name, taxicabs, radios and the like—will be of little value when the company is stripped of the right to operate.

(Appendix "B"). The California Supreme Court denied a petition for hearing on May 3, 1979.[9]

The California Court of Appeal did not find—and, indeed, San Francisco had not seriously urged—that Proposition K was justified by the kind of constitutionally sufficient governmental interests which this Court weighed—but ultimately found wanting—in *Allied Structural Steel Co. v. Spannaus*, ... U.S. ...., 57 L.Ed. 2d 727 (1978) and *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). Rather, it based its decision solely on the proposition that "[a] license or permit to engage in the taxicab business, issued by the city pursuant to its police power, does not convey a vested property right [or] . . . contract rights in the continuance of the regulation." Appendix "A" at 7, *infra*. In other words, even though Appellants acquired permits which, by the terms of the statutes under which they were issued, were irrevocable and transferable, Appellees could render the permits non-transferable and thereafter revoke them simply by amending those statutes. Moreover, because the permits were neither "contracts" nor "property", this could be done without even implicating (in the sense of

9. The judgment of the California court is final. Although in form, the Superior Court has denied only a preliminary injunction and has been sustained by the appellate court in that ruling, the decision of the California Court of Appeal—which the Supreme Court of California refused to review—reached the merits of the controversy and upheld the constitutionality of Proposition K. This is therefore a case in which the California courts have "fully adjudicated rights and that . . . adjudication is not subject to further review by a state court." *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942). There are no further issues to be resolved in the trial court, which absent review in this Court will be obliged by the holding of the Court of Appeal to dismiss the complaint. Accordingly, the decision is final. *See Abood v. Detroit Board of Education*, 431 U.S. 209, 216 n. 8 (1977); *Avery v. Midland County*, 390 U.S. 474, 478 n. 2 (1968); *Mills v. Alabama*, 384 U.S. 214, 217-18 (1966); *Construction Laborers v. Curry*, 371 U.S. 542, 550-51 (1963); *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379, 381-83 (1953).

requiring a weighing of interests) the Contract and Due Process Clauses.

THE CONSTITUTIONAL QUESTIONS ARE SUBSTANTIAL

I. Appellants' Taxicab Permits Are "Contracts" and "Property".

The holding of the California Court of Appeal that Appellants possessed neither "contracts" nor "property" is contrary to decisions of this Court. Indeed, it is difficult to discern the rationale of the decision below, which studiously avoids coming to grips with—or even citation of—those cases and the principles they establish.

Appellees intimated below that statutes cannot create contract rights or property rights. That view is plainly wrong. "[A] legislative enactment may contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the State or its subdivisions within the protection of [the Contracts Clause]." *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938); *see also United States Trust Co. v. New Jersey*, 431 U.S. 1, 17-18 n. 14 (1977). "[The] laws which subsist at the time and place of the making of a contract . . . enter into and form a part of it. . . . This principle embraces alike those which affect its validity, construction, discharge and enforcement . . . ." *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 429-30 (1934). In short, promises found in the statute books—here the provisions of the Police Code making permits *irrevocable* (except for cause) and fully transferable to qualified applicants—are part of the contract (here the license).[10]

10. For example, in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), the right in question was created by a statutory covenant. In *Indiana ex rel. Anderson v. Brand, supra*, the teacher's formal contract was for a term of years, but a statute—held to create an enforceable contract within the meaning of the Contract Clause—gave the teacher indefinite tenure. In *El Paso v. Simmons*, 379 U.S. 497 (1965), the Court treated as cognizable under the Contract Clause a claim of impairment of a statutory right to reinstate an installment contract. Likewise, statutes granting public utilities the right to use the public roads to install poles or conduits create vested rights protected by the Contract Clause. *Russell v. Sebastian*, 233 U.S. 195 (1914); *Owensboro v. Cumberland Telephone & Telegraph Co.*, 230 U.S. 58, 65 (1913). Statutes granting a franchise to sell gas or water to municipal residents are likewise subject to the Contract Clause. *New Orleans Gas-Light Co. v. Louisiana Light Etc. Co.*, 115 U.S. 650 (1885); *New Orleans Water-works Co. v. Rivers*, 115 U.S. 674 (1885).

It is therefore no answer to Appellants' claim to say that statutes can be repealed. Of course they can, but the Contract Clause prevents the repeal from impairing those rights which had previously vested.

Equally without merit is the contention advanced below that an irrevocable and transferable taxicab permit is not "property" within the ambit of the Due Process Clause if the rights granted are the creature of statute.

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

Board of Regents v. Roth, 408 U.S. 564, 577 (1972); *see also Memphis Light, Gas & Water Div. v. Craft*, ... U.S. ...., 56 L.Ed. 2d 30, 39 (1978); *Perry v. Sindermann*, 408 U.S. 593, 599-601 (1972). Here the terms of the taxicab permits were set forth in provisions of the San Francisco Police Code making the permits irrevocable and transferable.

Likewise, if Appellees have meant to urge that taxicab permits (or analogous licenses) confer only "privileges" and not "rights," that contention must fail. "[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized

as a 'right' or as a 'privilege.'" *Graham v. Richardson,* 403 U.S. 365, 374 (1971); *see also Sherbert v. Verner,* 374 U.S. 398, 404 (1963); *Shapiro v. Thompson,* 394 U.S. 618, 627 n.6 (1969); *Goldberg v. Kelly,* 397 U.S. 254, 262 (1970); *Arnett v. Kennedy,* 416 U.S. 134, 165 (1974) (Powell, J., concurring). Thus in *Bell v. Burson,* 402 U.S. 535 (1971), the Court held that a motor vehicle operator's license—certainly not obtained as of right—became "property" once issued and could not be revoked except in compliance with the Due Process Clause.

The California Court of Appeal did not discuss these arguments of Appellees. Instead, it flatly held that a "license or permit to engage in the taxicab business, issued by the City pursuant to its police power, does not convey a vested property right [or] . . . contract rights. . . ." Appendix "A" at 7, *infra.*

It is this unambiguous holding—which flies in the teeth of numerous decisions of this Court and is supported by none—which is presented for review. The stark proposition of law announced by the court below—that governmental permits are neither "contracts" nor "property"—is an argument for virtually unlimited power. It is a contention that such permits may be made non-transferable even though by their terms they are freely transferable; that they may be revoked even though by their terms they are irrevocable; that they may be revoked without cause even though by their terms they may be revoked only for good cause; and that, because they involve no "contract" or "property" interest, all of this may be done without notice, an opportunity to be heard, or justification. Even one visiting this planet from another place, wholly unschooled in our legal system and tradition, might find that contention astonishing.

The determination of whether the rights conferred upon Appellants by their irrevocable and transferable permits

constitute protected "contracts" or "property" cannot be resolved by the simplistic formula advanced by the Court of Appeal. Contract and Due Process Clause protection is not avoided by labelling; a permit is not stripped of contract or property status by terming it a "license." Cases such as this require an examination of all of the facts and circumstances, including the statutory background and the reasonable expectations which those facts and laws create. A governmental grant of rights is not necessarily an enforceable, protected contract simply because found in a document laced with "whereas" clauses; and conversely it is not denied protection merely because it is called a "permit" or a "license." Realities, not labels or slogans, control.

The decisions of this Court are contrary to the novel pronouncement of the court below. Thus, for example, it is settled that rights unreservedly granted by the state in the form of a corporate charter are protected by the Contract Clause. *Dartmouth College v. Woodward,* 17 U.S. (4 Wheat.) 518 (1819). Perhaps even more closely in point is *Russell v. Sebastian, supra* note 10. There, a state law had granted utilities the right to lay pipes in the public roads. This provision was held to create a vested, contract right which, once accepted, could not be revoked. The Court squarely rejected an argument very much like the one made by the Appellee in this case:

> "When the voice of the state declares that it is bound if its offer is accepted, . . . we should be slow to conclude that only a revocable license was intended." (*Id.* at 204).

Accord, New Orleans Gas-Light Co. v. Louisiana Light Etc. Co., 115 U.S. 650 (1885) (franchise granted by statute authorizing holder to distribute gas to residents of New Orleans is a "contract" protected against abrogation).

Rights granted by license or franchise are also "property" within the meaning of the Fourteenth Amendment.[11] Thus in *Bell v. Burson, supra,* a vehicle operator's license was held to be property protected by the Due Process Clause. As the Court said in that case, "[o]nce licenses are issued, . . . their continued possession may become essential in the pursuit of a livelihood." 402 U.S. at 539. See also *Frost v. Corporation Commission,* 278 U.S. 515, 519-20 (1929) (public utility franchise is "property" protected by Fourteenth Amendment); *Owensboro v. Cumberland Tel. & Tel. Co.,* 230 U.S. 58, 65-66 (1913) (same).

The opinion of the court below altogether fails to deal with these decisions and principles. Its holding that the permits were neither "contracts" nor "property" is an *ipse dixit,* relying on California cases which stand for the unremarkable but irrelevant proposition that the "use of streets by taxicabs [or others] is a privilege that may be granted or withheld without violating . . . due process . . . ." Appendix "A" at 6-7, *infra,* quoting from *Luxor Cab Co. v. Cahill,* 21 Cal. App. 3d 551, 558, 98 Cal. Rptr. 576 (1971). It is doubtless true that the Due Process Clause does not confer a right to use the public streets to operate a commercial business. But to say that there is no "right" to obtain a taxicab permit does not dispose of, or even bear upon, the question posed in *this* case: whether, once an *irrevocable* and *transferable* permit to use those streets *is* granted by a city, it subsequently may make that permit non-transferable, and thereafter revoke it without cause.

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11. The Court said in *Walla Walla v. Walla Walla Water Co.,* 172 U.S. 1, 9 (1898):

> "[T]his court has too often decided, for the rule to be now questioned, that the grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of its services by the grantee, is the grant of a franchise [which is] . . . a contract protected by the constitution of the United States against state legislation to impair it."

The Court of Appeal's reliance on cases holding that there is no right to a permit in the first instance improperly revives—*sub silentio*—the discredited "right-privilege" distinction. Indeed, were that distinction applicable to Contract Clause claims, the Clause would protect only those contracts which the government was obliged to make. It is equally inapplicable to the Due Process Clause. *See* cases cited on pp. 11-12, *supra.* As Mr. Justice Powell wrote in *Arnett v. Kennedy, supra* at 165, "the 'wooden distinction' between 'rights' and 'privileges' was not determinative of the applicability of procedural due process and . . . *a property interest may be created by statute as well as by contract.*" (Concurring opinion).[12]

In this case, San Francisco subjected itself to the strictures of the Contract and Due Process Clauses by granting

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12. The Court of Appeal states in passing that "[n]o standards govern the police commission's consent to transfers, other than those set forth in sections 1075 and 1076" and that the statute "did not provide for continuation of that practice [of allowing transfers to qualified applicants]." Appendix "A" at 7-8, *infra.*

These observations, while accurate, are incomplete and irrelevant. Section 1079 undeniably granted permit holders the right to transfer upon the consent of the Police Commission. At the very least, Proposition K stripped permit holders of the right to *request* that approval. Thus even if the police commission had unfettered discretion, Proposition K denies permit holders the right to invoke that discretion.

Moreover, the Contract and Due Process Clauses protect not only rights explicitly created by statute but also "a broad range of interests that are secured by 'existing rules or understandings.'" *Perry v. Sindermann,* 408 U.S. 593, 601 (1972). In this case, the undisputed evidence—accepted as true by the Court of Appeal—was that the Police Commission "has routinely allowed the transfer of taxicab and other permits to and from individuals and entities of all types." Appendix "A" at 4, *infra.*

Accordingly, the contention that Proposition K in fact converts permits which were transferable to qualified applicants into permits which cannot be transferred is established by an uncontradicted record. Even if it were not, the parallel claim—that Proposition K causes the revocation of irrevocable permits—is acknowledged by Appellee to be true.

permits which, by law and practice, were irrevocable and transferable. In foreseeable reliance on those terms, private citizens invested labor and capital, acquired vehicles, radios, and other capital assets, developed good will, trained employees, entered into employment contracts, purchased and sold permits, and extended credit on the security of permits. In these and numerous other ways they relied on the unambiguous commitments of San Francisco that, at least so long as the permit holders complied with the applicable laws and regulations, the permits would remain irrevocable and transferable. These expectations and actions are precisely the kinds of interests which the Contract and Due Process Clauses protect.

II. The Impairment of Contract Obligations and the Taking of Property Without Cause or Compensation Effected by Proposition K Is Unreasonable and Unjustified and Hence Is Unconstitutional.

Once it is established that a state law impairs contractual obligations and cancels property rights, it becomes necessary to engage in a weighing analysis to determine whether that impairment is permissible under the Contract or Due Process Clauses. In the court below, Appellees did not defend Proposition K on the ground that its impairment of rights served constitutionally sufficient governmental interests, but solely on the ground that taxicab permits confer no constitutionally protected interests. That was the view, as well, of the Court of Appeal. In Part I, we showed why this approach was incorrect. That error alone would require that the judgment of the court below be reversed. But even though Appellees did not urge the California Court of Appeal to sustain Proposition K on the ground that it served sufficiently weighty governmental interests, we think it prudent to discuss that issue here. An analysis

of the relevant standards as applied to Proposition K will leave no doubt that this measure cannot pass constitutional muster.

The most recent statements of the governing federal standard under the Contract Clause were given in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) and *Allied Structural Steel Co. v. Spannaus*, — U.S. —, 57 L.Ed. 2d 727 (1978). In *United States Trust*, the Court, in sustaining a claim that a New Jersey law impermissibly impaired the obligations of contract, observed that "the Contract Clause [is not] without meaning in modern constitutional jurisprudence [and] its limitation on state power [is not] illusory." 431 U.S. at 16. The "Clause limits otherwise legitimate exercises of state legislative authority, *and the existence of an important public interest is not always sufficient to overcome that limitation.*" *Id.* at 21 (emphasis added). "[L]aws intended to regulate existing contractual relationships must serve a legitimate public purpose." *Id.* at 22. Such an impairment, to be valid, must be "*reasonable and necessary* to serve an *important* public purpose." *Id.* at 25 (emphasis added). Moreover, any such law must be appropriately tailored to achieve the objective; the means must be in reasonable harmony with the ends:

> "Legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." (*Id.* at 22).

Although laws regulating contracts between private parties may receive judicial deference to "legislative judgment as to the necessity and reasonableness of a particular measure" (*Id.* at 23), the Court has established a more rigorous standard of review where—as is undeniably the case of Proposition K—"a State impairs the obligation

of its *own* contract...." *Id.* at 23 (emphasis added). Of that situation, in contrast to one in which the law impairs only agreements between private parties, the Court said:

> "As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an mportant public purpose. In applying this standard, however, complete deference to a legislature assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." *Id.* at 25-26.

See also *Allied Structural Steel Co. v. Spannaus, supra,* 57 L.Ed. 2d at 736 n.15. *United States Trust Co.* also stresses that a "less burdensome alternative" analysis is relevant to Contract Clause cases, for "a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." 431 U.S. at 31.[13]

Application of these principles to the facts of the present case produces as lopsided a weighing of interests as can be imagined; no legitimate interest—indeed, no interest short of the chimerical—has been advanced which conceivably could justify Proposition K's impairment of the contract and property rights of permit holders.

Indeed, it is difficult to fathom just *what* purpose Proposition K is designed to serve,[14] which is perhaps why

13. The Chief Justice wrote separately to stress his understanding that a state law repealing its own contractual obligation is invalid unless "the State [can] demonstrate that the impairment was essential to the achievement of an important state purpose" *and* that "the State . . . did not know and could not have known the impact of the contract on that state interest at the time that the contract was made." *Id.* at 33.

14. One will not discern any constitutionally sufficient interests from reading the ballot argument submitted to the voters. Such suggestions of purpose as are contained therein are dealt with here-

Appellees have declined to defend it on that level. We do not dispute the power of San Francisco to update its regulations affecting operation of taxicabs; it is enough to say that Proposition K does not do so. It cannot be said to serve the interest of getting more taxi service on the streets of San Francisco; that could be accomplished simply by issuing new permits, which San Francisco was able to do under existing, pre-Proposition K law. *Luxor Cab Co. v. Cahill,* 21 Cal. App. 3d 551, 98 Cal. Rptr. 576 (1971). Nor does it upgrade qualifications of those who may hold permits; the prior law gave the relevant officials broad power to reject proposed permitees and to revoke outstanding permits for cause and Proposition K makes no relevant changes in those standards. It cannot be said that Proposition K is designed to improve the quality of taxi and other vehicle for hire service, for the old law conferred ample power upon the City to regulate service[15] and, again,

after. It bears mention, however, that the ballot argument seriously *misstated* the legal effects of Proposition K. It misleadingly suggested some legitimate purposes for the measure, but failed to disclose that *those* aspects were identically dealt with by existing law, which Proposition K simply re-enacted without change.

The text of the argument, and a detailed explanation of the ways in which the ballot argument was misleading, are set forth at App. 10-12.

15. The prior law extensively regulated the taxi industry. Holders of taxicab permits were required to "daily operate" the taxi "to the extent reasonably necessary to meet the public demand ...." S.F. Police Code § 1079. Cessation of operations for ten consecutive days was grounds for revocation. *Id.* Taxi operators were required to maintain liability insurance in specified amounts, and to post a bond securing payment of any judgment. *Id.* § 1080.1. Sworn statements were required to be filed annually certifying that the permit holder was in compliance with all local, state and federal laws. *Id.* § 1081. Other provisions regulated the use of taxi stands (*id.* §§ 1119-20), color schemes for taxis (*id.* §§ 1121-22), improper solicitation (*id.* § 1123), taxi meters (*id.* § 1136), the resolution of disagreements regarding fares (*id.* § 1137), the use of the taxicab flag (*id.* § 1139), display of rates (*id.* § 1142), solicita-

Proposition K makes no relevant changes in this regard. Finally, it cannot be urged that Proposition K is intended to reduce taxi fares, for under the old law, the City set the maximum fares (*see* S.F. Police Code § 1135) *and, in setting rates, did not take into account (and of course remains fully free to ignore) the cost or value of taxi permits in determining the reasonableness of taxi fares.* (App. 94, 214). In short, there is no showing that the transferability and irrevocability of permits had caused any public injury whatever, let alone that such injury required the drastic remedy of Proposition K.

It bears special emphasis that Proposition K cannot responsibly be defended as a proper exercise of the "police power" of the city. Cases can, of course, be found for the proposition that the Contract Clause is limited by the maxim that the State reserves the power to legislate in exercise of its police powers to protect the health, safety and morals of the public. Doubtless this is true. But the "police powers" which the Court has held were not surrendered by the granting of a charter, franchise or permit are those necessary to protect the public health, morals and safety. The exception does not swallow the rule, for if it did the Contract Clause would be a dead letter. The cases

tion of business at certain locations (*id.* §§ 1152, 1156), and treatment of lost property (§ 1157). Each driver of a licensed taxi was required to have a driver's permit (*id.* § 1124), which can only be issued to persons who met the specific and detailed qualifications set forth in Section 1127 and who have passed an examination given by the Police Department. *Id.* § 1129. Drivers were required to maintain a "waybill" on which each trip was recorded. *Id.* § 1135.3. Taxi operators were forbidden to refuse service to any non-intoxicated, orderly passenger seeking transportation. *Id.* § 1138. Other provisions prohibited the misdirection of passengers to hotels or restaurants other than that requested as well as commission agreements for the referral of passengers to particular restaurants or hotels. *Id.* §§ 1159-1159.1.

invoking it go no farther than to preserve the state's right to regulate or forbid activities dangerous to public health[16] or morals[17]; where the activity does not jeopardize those police power interests, the state must adhere to its bargain. *See Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1 (1898) (city's franchise granting private firm right to deliver water to city cannot be abrogated where not contrary to public health and morals); *New Orleans Gas-Light Co. v. Louisiana Light, Etc. Co.*, 115 U.S. 650 (1885) (gas franchise cannot be abrogated on grounds irrelevant to the public health, safety or morals).

Appellees have never claimed that Proposition K in any way protects either the public's health, safety or morals. As shown above, it effects no material change in the conduct of permit holders, or in the qualifications of those who may operate taxicabs. Taxicabs as such pose no danger to public health or to good morals[18]; and in any event it is plain that San Francisco has not undertaken to abolish them or even to reduce their numbers.

That no implied reservation of the police powers of Appellee can save Proposition K from invalidity is also shown by the decision in *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938). There, a teacher had been employed under a tenure law and contract which taken together

16. *See Pierce Oil Corp. v. City of Hope*, 248 U.S. 498 (1919) (restrictions on storage of oil); *Fertilizing Co. v. Hyde Park*, 97 U.S. 659 (1878) (repeal of right to carry dead animals or fertilizer in the public streets).

17. *See Stone v. Mississippi*, 101 U.S. 814 (1880) (prohibition of lotteries); *Beer Co. v. Massachusetts*, 97 U.S. 25, 32-33 (1878) (prohibition on manufacture of beer).

18. We think this Court can take judicial notice that, to paraphrase a famous *bon mot* (variously attributed to the late James J. Walker of New York and to H. L. Mencken) on the subject of books, no one was ever seduced by a taxicab.

provided for termination only for specific causes. The tenure law was repealed and the teacher was subject to dismissal. Repeal of the tenure law was challenged as an impairment of contract; in response to the state's contention that all state contracts are "subject to the police power" or "reserved power of the state" (303 U.S. at 107), the Court concluded that the provisions in the former law for dismissal for "cause" were sufficient to guarantee the state's ability to effectuate proper police power objectives, and that "[t]he causes of cancellation provided in the [former] Act . . . are persuasive that the repeal of the earlier act by the latter was not an exercise of the police power for the attainment of ends to which its exercise may properly be directed." 303 U.S. at 109.

In this case, as in *Brand,* the prior law expressly reserved to Appellees all of the power they needed to deal with concerns within the proper scope of the police power. Permits could be revoked for cause; proposed transferees had to meet the same suitability standards as original permitees. Vehicle for hire operators were and are extensively regulated. *See* note 15, *supra.* As in *Brand,* these explicit powers and standards demonstrate that repeal of the former law's protection of contract rights "was not an exercise of the police power for the attainment of [proper] ends . . . ." 303 U.S. at 109.

A more blatant violation of the mandate of the Contract Clause would be difficult to imagine. As in *Allied Structural Steel, supra,* "if the Contract Clause means anything at all, it means that [San Francisco] could not constitutionally do what it tried to do . . . in this case." 57 L.Ed 2d at 740.

The same conclusion follows under the Fourteenth Amendment. This is not a "substantive due process" case.

Rather, it presents the baldest form of taking: Proposition K will result in the outright cancellation[19] of each of the more than 700 taxicab permits without the payment of any compensation to those who have acquired them, in good faith, at a substantial cost.[20]

The first Mr. Justice Harlan's observations as to this subject, made nearly a century ago, are no less applicable or authoritative today:

> "If, in the judgment of the state, the public interests will be best subserved [by an abrogation of a utility's franchise], the way is open for the accomplishment of that result . . . . The rights and franchises which have become vested . . . can be taken by the public, upon just compensation to the company, under the State's power of eminent domain. [Citations]. In that way the plighted faith of the public will be kept with those who have made large investments upon the assurance by the State that the contract with them will be performed." (*New Orleans Gas Light Co. v. Louisiana Light, Etc. Co.,* 115 U.S. 650, 673 (1885)).

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19. Because Proposition K will cause the outright cancellation of the permits, this case presents no question of a *partial* impairment of rights such as that presented in *Penn Central R. Co. v. New York,* ..... U.S. ....., 57 L.Ed. 2d 631 (1978).

20. The requirements of the Just Compensation Clause of the Fifth Amendment apply to the States by virtue of the Fourteenth. *Chicago, B. & Q. R. Co. v. Chicago,* 166 U.S. 226, 134-36 (1897).

CONCLUSION

For these reasons, the Court should note probable jurisdiction of this appeal.

Respectfully submited,

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Attorneys for
Appellants

June 27, 1979

(Appendices Follow)

Appendix "A"

In The Court of Appeal of The State of California
First Appellate District, Division Four

Filed MAR 6 1979

JAMES E. O'CONNOR, etc., et al., *Petitioners,* vs. SUPERIOR COURT, CITY AND COUNTY OF SAN FRANCISCO, *Respondent,* SAN FRANCISCO POLICE COMMISSION, et al., *Real Parties in Interest.*	1 Civil No. 44865 (Sup.Ct.No. 740687)
LUXOR CAB COMPANY, etc., et al., *Petitioners,* vs. SUPERIOR COURT, CITY AND COUNTY OF SAN FRANCISCO, *Respondent,* THE CITY AND COUNTY OF SAN FRANCISCO, et al., *Real Parties in Interest.*	1 Civil No. 44907 (Sup.Ct.No. 74073)

James E. O'Connor, et al., and Luxor Cab Company, et al., seeks writs of mandate to compel respondent superior court to issue preliminary injunctions to prevent real parties in interest, the City and County of San Francisco, the San Francisco Police Commission, Charles R. Gain, and the Controller of the City and County of San Francisco, from enforcing a measure adopted by popular vote. Relief is sought on two theories: that the measure was not properly submitted to the voters and that it is unconstitutional.

An order denying a preliminary injunction is subject to review on appeal. (See 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 77, p. 4088.) It appeared to this court that appeal was an adequate remedy, and that if necessary, a writ of supersedeas could be issued to preserve the subject matter of the litigation pending determination of the appeals. (*People ex rel. S.F. Bay etc. Com. v. Town of Emeryville* (1968) 69 Cal.2d 533.) On that basis the petitions were denied. The Supreme Court granted hearing as to both petitions and retransferred the causes to this court with directions to issue alternative writs of mandate. That action determines for the purpose of further proceedings in this court that there is no adequate remedy in the ordinary course of law. (See *People ex rel. Younger v. County of El Dorado* (1971) 5 Cal.3d 480, 491.)

These cases involve a challenge to an initiative ordinance approved by the voters of San Francisco on June 6, 1978, known as Proposition K. The measure compels all existing taxicab permittees to surrender their permits in exchange for new permits which "shall be non-transferable and non-assignable either expressly or by operation of law." (Prop. K, § 4, subd. (b).) It also provides that "[a]ny such surrender and exchange shall be without fee to the permit holder." The new permits will be automatically revoked upon (1) the death of the permit holder, if an individual, or (2) apparently, the sale or transfer of 10 percent or more of the stock or assets of a corporate permit holder. (Prop. K, § 5, subd. (a).) No person may hold more than one permit, and permits may be held only by natural persons, except in the case of legal entities which presently hold existing permits. (Prop. K, § 2, subds. (c), (d).) The registrar of voters, on June 21, 1978, certified that the ordinance was adopted at a city general election.

Petitioners all hold vehicle for hire permits issued by the City and County of San Francisco. Before Proposition K was enacted, the operation of taxicabs and other motor vehicles for hire was regulated by article 16, sections 1075-1190, of the San Francisco Municipal Code, sometimes known as the Police Code. The police commission was authorized to issue permits upon determining that "public convenience and necessity require the proposed motor vehicle for hire service for which application for a license or permit is made." (Police Code, § 1075.) In determining whether public convenience and necessity were present, the commission was authorized to take into consideration all pertinent facts: it was required to make specific findings in each case that (1) the applicant was financially responsible; (2) the applicant was under efficient management, earning a fair and reasonable return on its capital; (3) the persons, firms or corporations holding outstanding permits were, under normal conditions, inadequately serving the public; and (4) the applicant had complied with applicable provisions of the Municipal Code and pertinent state or federal laws. (Police Code, § 1076.)

Section 1079 of the Police Code made provisions for transfer of permits: "All such permits and licenses granted . . . shall be transferable upon the consent of the Police Commission, after written application shall first have been made to said Commission and upon payment of the fee required . . . ."

More than 700 taxicab permits, and a substantial number of other motor vehicle for hire permits were outstanding when Proposition K was enacted. Changes in the entities holding permits had been effected primarily through the

transfer of outstanding permits for a consideration paid by the transferee to the transferor (§ 1079). Over the years the usual payment exacted by transferors has increased as the number of outstanding permits authorized by the police commission remained largely constant. The commission has routinely allowed the transfer of taxicab and other permits to and from individuals and entities of all types. It also routinely gave effect to court orders requiring sales or other transfers of permits in connection with domestic relations proceedings, execution sales, decrees of distribution, and bankruptcy proceedings. The commission also recognized the use of permits as security in financing arrangements.

The code provided that "all rights herein granted may be rescinded and ordered revoked by the Police Commission *for cause*." (Police Code, § 1079, emphasis added.) Similarly, section 1130 provided that such revocations could be made "*only for good cause* shown upon notice and hearing." (Emphasis added.)

I

It is contended that Proposition K "was not properly put before the electorate and thus is void." This contention is based on the following language of section 9.108 of the city charter: "Any ordinance which the supervisors are empowered to pass may be submitted to the electors by a majority of the board at a general election or at a special election called for the purpose, said election to be held not less than thirty days from the date of the call. Any such ordinance may be proposed by one-third of the supervisors, or by the mayor, and when so proposed shall be submitted to the electors at the next succeeding general election." Only five of the eleven supervisors joined in submitting Proposition K to the registrar of voters for presentation to the electorate. It is argued that section 9.108 requires that a

measure may be proposed to the board of supervisors by not less than one-third of its members, but that a measure so proposed is not to be placed on the ballot unless the proposal receives the assent of a majority of the board.

This construction of section 9.108 cannot be accepted. We conclude that an ordinance may be submitted by a majority of the board at a general election or at a special election called for the purpose. An ordinance may also be proposed for referendum by one-third of the supervisors or by the mayor; in the later event a special election cannot be called and the measure will be submitted to the electors only at the next succeeding general election. The action of five supervisors in proposing Proposition K was effective.

Proposition K was voted upon at the June 6, 1978, state primary election. Therefore, it must be determined whether that election was a general election within the meaning of section 9.108. Elections Code section 20 defines "general election" as "the election held throughout the state on the first Tuesday after the first Monday of November in each even-numbered year" and section 27 defines "special election" as "an election, the specific time for the holding of which is not prescribed by law." Therefore, the election at which Proposition K was voted upon does not fall within either of those statutory definitions. The June 6, 1978, election was, for purposes of state law, a direct primary, i.e., "the primary election held on the first Tuesday after the first Monday in June in each even-numbered year. . . ." (Elec. Code, § 23.) Elections Code section 22807 provides that: "A proposition may be submitted at a regular election, or a special election may be called, by ordinance or resolution, for the purpose of voting on a proposition." A "regular election" is an election, the specific time for the holding of which is prescribed by law. (Elec. Code, § 26.) Therefore, a direct primary is a

regular election for purposes of the Elections Code. Section 9.108 of the city charter does not show an intention to create a different requirement for city elections. We conclude that it was proper for at least one-third of the supervisors to submit the measure to the electorate at the June primary.

Having expressed these views we do not reach the question whether a challenge to the election procedure is cognizable in these proceedings. Petitioners do not allege that they sought a writ or injunction to prevent Proposition K from being placed on the ballot prior to the election. "The general rule is that mandamus lies to compel the removal of anything placed on the ballot that is not authorized by law." (28 Cal.Jur.3d, Elections, § 247, p. 597.) Where an available pre-election remedy was not pursued, we explicitly refrain from intimating that the present challenge to the election process could prevail if petitioners' construction of section 9.108 of the city charter were correct.

II

Petitioners contend that Proposition K unconstitutionally impairs the obligation of contract and takes property without just compensation determined according to due process. Real parties in interest defend Proposition K with the contention that motor vehicle for hire permits are licenses and privileges granted pursuant to the police power, are not contracts, and do not convey vested rights. In *Luxor Cab Co. v. Cahill* (1971) 21 Cal.App.3d 551, this court affirmed a judgment which had denied an injunction and writ of mandate sought to prevent the board of permit appeals from issuing new certificates for the operation of taxicabs. In that case, the appellants argued that the board's issuance of the new certificates infringed on vested rights. The court concluded "[t]he use of streets by taxicabs is a privilege that

may be granted or withheld without violating either due process or equal protection. This privilege may be granted exclusively or nonexclusively to render public services (*In re Petersen,* 51 Cal.2d 177, 182-183 [331 P.2d 24].) In any event, the granting or withholding of a privilege based upon certificates of public convenience and necessity presents no judicial controversy touching on the impairment of vested rights. (*San Diego etc. Ferry Co. v. Railroad Com.,* 210 Cal. 504, 513 [292 P. 640])." (*Id.,* at p. 558. Also see *People v. Galena* (1937) 24 Cal.App.2d Supp. 770.)

Similarly, in *Sievert v. City of National City* (1976) 60 Cal.App.3d 234, the Court of Appeal affirmed a summary judgment which had held a city ordinance regulating ambulances to be valid. The court stated: "The use of public streets for private enterprise is a special privilege peculiarly subject to regulation, and may be withheld on reasonable grounds related to public safety, health and welfare. There is no vested or constitutional right to use a public street for conducting private business (*People v. Galena,* 24 Cal. App.2d Supp. 770, 775 [70 P.2d 724]; *People v. Amdur,* 123 Cal.App.2d Supp. 951, 964 [267 P.2d 445]; McQuillin, Municipal Corporations (3d ed.) § 24.669)." (60 Cal.App.3d at p. 236.) A license or permit to engage in the taxicab business, issued by the city pursuant to its police power, does not convey a vested property right.

Contrary to petitioners' contentions, an ordinance adopted in the exercise of the police power does not create contract rights in the continuation of the regulation. Section 1079 provided that "[a]ll such permits and licenses granted . . . shall be transferable upon the consent of the Police Commission, after written application shall first have been made to said Commission and upon payment of the fee required. . . ." No standards govern the police com-

mission's consent to transfers, other than those set forth in sections 1075 and 1076. Section 1075 authorized the police commission to issue taxicab permits upon determining that "public convenience and necessity" so required and section 1076 set forth what facts were to be considered in evaluating "public convenience and necessity." Even if the police commission had routinely permitted the transfer of taxicab permits, the ordinance did not provide for continuation of that practice.

Petitioners also contend that the ordinance, if applied to them, would be given an unconstitutional retroactive effect. But the fact that an enactment alters legal relationships and disappoints business expectations is not fatal. Such a law is invalid only if it encroaches on vested rights or impairs the obligations of contract. (*Rosenblatt v. California State Board of Pharmacy* (1945) 69 Cal.App.2d 69, 72.) We have seen that no vested rights in the taxi permits existed. None of the petitioners claims to have entered into a contract for the transfer of a permit to a third party prior to the effective date of Proposition K, which would now be adversely affected by application of the new ordinance. Since we have concluded that petitioners do not possess a vested right to the free transferability of their permits, the retrospective aspect of the statute is not invalid.

III

It is contended that real parties in interest are estopped from giving effect to Proposition K. This contention has no substance. "An estoppel also cannot be invoked to enlarge the power of a public agency or to defeat the effective operation of a policy or statute adopted for the protection of the public." (30 Cal.Jur.3d, Estoppel and Waiver, § 4, p. 700.)

The alternative writs of mandate are discharged and the petitions are denied.

Certified for publication.

.....

Christian, J.

We concur:

.....

Caldecott, P. J.

.....

Drummond, J.*

*Under assignment by the Chairperson of the Judicial Council.

Appendix "B"

Court of Appeal of the State of California
in and for the
First Appellate District
Division Four

Filed Mar 23 1979

No. 44865 San Francisco Superior Court No. 740687

James E. O'Connor, et al.,
Petitioners,

vs.

Superior Court, City and County of San Francisco,
Respondent,

San Francisco Police Commission, et al.,
Real Parties in Interest.

BY THE COURT:

The petition for rehearing in the above entitled cause is hereby denied.

Dated Mar 23 1979

CALDECOTT, P. J.

.....

Appendix "C"

CLERK'S OFFICE, SUPREME COURT
4250 State Building
San Francisco, California 94102

MAY 3, 1979

I have this day filed Order .....

HEARING DENIED

In re: 1 Civ. *Nos.* 44865, 44907—O'Connor, et al.

vs.

Superior Court, City and County of San Francisco

Respectfully,

G. E. BISHEL
Clerk

Appendix "D"

Court of Appeal of the State of California
First Appellate District
Division Four

No. 1 Civ. 44865

James E. O'Connor; Samuel Alhadeff; June Alhadeff; Frank Tripoli; Herman Wikkeling; Yellow Cab Cooperative, a California cooperative corporation; Sedan Operators Cooperative, Inc., a California cooperative corporation; Rick Johansen; Changs Incorporated, a California corporation; and State Cab Co., Inc., a California corporation,
Petitioners,

vs.

Superior Court of the State of California For The County of San Francisco,
Respondent.

San Francisco Police Commission; Richard J. Siggins, Judith E. Ciani, Jane McKaskle Murphy, Dr. David J. Sanchez, and Burl A. Toler, as members of the San Francisco Police Commission; Charles R. Gain; City and County of San Francisco, a municipal corporation; Controller of the City and County of San Francisco,
Real Parties in Interest.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Petitioners herein hereby appeal to the Supreme Court of the United States from

the final judgment of this Court denying a Petition for Writ of Mandate entered in this action on March 6, 1979.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

Dated: May 8, 1979

Respectfully,

HOWARD, PRIM, RICE, NEMEROVSKI, CANADY & POLLAK
A Professional Corporation

By: /s/ JEROME B. FALK, JR.
Jerome B. Falk, Jr.
Attorneys for Petitioners

Appendix "E"

REGULATIONS FOR TAXICABS AND OTHER MOTOR VEHICLES FOR HIRE

BE IT ORDAINED BY THE PEOPLE OF THE CITY AND COUNTY OF SAN FRANCISCO:

Section 1. The qualified electors of the City and County of San Francisco hereby declare it shall be the law of the City and County of San Francisco that:

(a) All taxicab permits and other vehicle for hire permits issued by the City and County of San Francisco are the property of the people of the City and County of San Francisco and shall not be sold, assigned or transferred; and

(b) The Chief of Police of the City and County of San Francisco shall have the responsibility of establishing regulations to assure prompt, courteous and honest service to the riding public; and

(c) The taxicab business shall operate under the principles of free enterprise and that taxicab operators may charge less than the maximum rate of fare set by law, as set forth below.

(d) The Police Commission shall issue a sufficient number of permits to assure adequate taxicab service throughout the City and County of San Francisco.

Section 2. The Application For A Permit.

(a) Any applicant for a permit to operate a taxicab or other vehicle for hire shall apply to the Police Commission for its declaration of public convenience and necessity on blanks to be furnished by the Secretary of the Police Commission, and within fifteen (15) days of the filing of such an application the Secretary of the Police Commission shall have a notice published in the official newspaper of the City and County of San Francisco. The notice shall state

that an application has been filed for a license or permit to operate a taxicab or other motor vehicle for hire or motor vehicle for hire business, the name of the applicant, the kind of equipment, and the number of taxicabs or other vehicles for hire which the applicant desires to operate. The notice shall be published for three successive days.

The applicant shall pay to the City and County of San Francisco a sum to cover the costs of advertising and investigating and processing the application for each permit, such sum to be determined periodically as appropriate by the Police Commission.

Protests against the issuing of a permit may be filed with the Police Commission. The Police Commission shall consider all protests and in conducting its hearing shall have the right to call such witnesses as it desires. In all such hearings the burden of proof shall be upon the applicant to establish by clear and convincing evidence, which shall satisfy the Police Commission, that public convenience and necessity require the operation of the vehicle or vehicles for which permit application has been made, and that such application in all other respects should be granted.

(b) No permit shall be issued unless the person applying for the permit shall declare under penalty of perjury his or her intention actively and personally to engage as permittee-driver under any permit issued to him or her for at least four (4) hours during any twenty-four (24) hour period on at least seventy-five (75%) of the business days during the calendar year. No more than one permit shall be issued to any one person.

(c) For two (2) years from the effective date of this Ordinance, a preference in the issuance of any permit shall be given to any person who has driven a taxicab or other motor vehicle for hire in the City and County of San

Francisco for at least one consecutive twelve (12) month period during any of the three (3) calendar years immediately prior to the filing of an application for issuance of such permit.

(d) No permit shall be issued except to a natural person and in no case to any business, firm, partnership or corporation.

(e) Subject to any other preference created in this Ordinance, all applications for a permit to operate a taxicab or other motor vehicle for hire shall be processed and considered in the order of their receipt by the Police Commission.

(f) No part of this Section 2 shall apply to any permit holder described in subparagraph (b) of Section 4 of this Ordinance.

Section 3. Facts to be Considered by Police Commission.

The Police Commission, in determining whether or not public convenience and necessity exist for the issuance of a permit, may consider such facts as it deems pertinent, but must consider whether;

(a) The applicant is financially responsible and will maintain proper financial records.

(b) The public will not be adequately or properly served unless the application is granted.

(c) The applicant has complied with all provisions of the Municipal Code, including pertinent motor vehicle laws.

(d) The applicant will be a full-time driver, within the meaning of Section 2(b) of this Ordinance, of the taxicab or other motor vehicle for hire.

Section 4. Continuous Operation.

(a) All permittees within the purview of Section 1075 of Chapter VIII, Part II of the San Francisco Municipal Code (Police Code) shall regularly and daily operate their taxicab or other motor vehicle for hire business during

each day of the year to the extent reasonably necessary to meet the public demand for such taxicab or motor vehicle for hire service.

Upon abandonment of such business for a period of ten (10) consecutive days by a permittee or operator, the Police Commission shall, after five (5) days' written notice to the permittee or operator, revoke the permit or permits of such permittee or operator: provided, however, that the Chief of Police, subject to the approval of the Police Commission and only after a thorough investigation, may on written application grant to the holder of any permit hereunder permission to suspend operation pursuant to such permit for a period not to exceed ninety (90) calendar days in any one twelve (12) month period in case of sickness, death, or other similar hardship.

No permit issued under this Ordinance shall be transferrable or assignable, either expressly or by operation of law. All such permits and all rights granted under them may be rescinded and ordered revoked by the Police Commission for good cause.

(b) All persons, businesses, firms, partnerships, corporation or other entities who possess outstanding permits to operate a motor vehicle for hire on the effective date of this section must surrender and exchange any such permits for new permits within sixty (60) days of the effective date of this section. The new permits shall be non-transferrable and non-assignable either expressly or by operation of law. Any such surrender and exchange shall be without fee to the permit holder. From and after the sixty-first (61st) day after the effective date of this section, all permits not surrendered for new permits shall be void and continuance of operation under any such void permits shall be punishable by a $500.00 fine and thirty (30) days incarceration in the county jail for each such void permit so used.

Section 5. Corporate Permittees.

(a) If any permittee is a corporation, any sale or other transfer of ten percent (10%) or more of the stock ownership or assets of the permittee, resulting from any transaction or series of transactions and computed on a cumulative basis, will be deemed to be a sale or transfer and the permit therefore shall be null and void, unless approved by the Police Commission in conformity with the requirements of this Ordinance.

(b) Any corporation holding a permit hereunder shall maintain a stock register at the principal office of the corporation in San Francisco and the stock register shall be available to the Police Department for inspection. Such corporation shall report to the department, in writing, any of the following:

(i) Issuance or transfer of any shares of stock to any person where the issuance or transfer results in the person owning 10 percent (10%) or more of the corporate stock.

(ii) Change in any of the corporate officers which are required by Section 821 of the California Corporations Code.

(iii) Change of any members of its board of directors.

(c) Any report required pursuant to subparagraph (b) hereof shall be filed with the Police Department within ten (10) days of the change, sale or transfer to be reported.

Section 6. Maintaining Financial and Accounting Records.

The Controller of the City and County of San Francisco shall have the responsibility of establishing regulations for the keeping and filing of financial statements and accounting books and records by every holder of a taxicab permit or other type of permit under this Ordinance. The purpose of such regulations is to provide information to the Board of Supervisors for ordinances respecting maximum rates

of fares or other charges and to the Police Commission for the performance of its duties under the law. Failure of any permit holder to comply with the Controller's regulations may be cause for revocation of all rights granted to a permit holder to operate a taxicab or other vehicle for hire.

Section 7. Rates for Taxicabs.

Notwithstanding any provision of the San Francisco Municipal Code, any person, firm or corporation operating a taxicab or taxicabs may set a rate of fare lower than the maximum rate which may be set from time to time by appropriate ordinance; provided, however, that any such lower rates shall be filed with the Board of Supervisors in writing prior to June 1st of any year, and, if approved by the Board, shall remain in effect until September 1st of the following year.

Section 8. Sections 1076, 1077, 1079 and 1135(B) of Chapter VIII, Part II of the San Francisco Municipal Code (Police Code) are hereby repealed.

Section 9. Sections 128.1, 128.2 and 128.3 of Part III, Article 2 of the San Francisco Municipal Code, are hereby repealed.

Section 10. Severability. If any section, sub-section, subdivision, paragraph, sentence, clause or phrase in this Ordinance or any part thereof, is for any reason held to be unconstitutional or invalid or ineffective by any court of competent jurisdiction, such decision shall not affect the validity or effectiveness of the remaining portions of this Ordinance or any part thereof. The qualified electors of the City and County of San Francisco hereby declare that they would have passed each section, sub-section, subdivision, paragraph, sentence, clause or phrase thereof irrespective of the fact that any one or more sections, subsections, sub-division, paragraphs, sentence, clause or phrases be declared unconstitutional, invalid or ineffective.

Supreme Court, U. S.
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78-1940

In the Supreme Court

OF THE

United States

OCTOBER TERM 1978

No. 78-1948

JAMES E. O'CONNOR, et al.,
Appellants,

vs.

SAN FRANCISCO POLICE COMMISSION, et al.,
Appellees.

On Appeal from the California Court of Appeal, First Appellate District

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

The appellees, the City and County of San Francisco, California and various of its officers, respectfully move to dismiss the appeal herein, or, in the alternative, to affirm the judgment of the California Court of Appeal, First Appellate District in this case. Rule 16(1)(c) and (d).

THE CITY AND COUNTY ORDINANCE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of the validity of a regulatory licensing system enacted by a vote of the people of the City and County of San Francisco (hereinafter "San Francisco") on June 6, 1978, which is known as Proposition K.

This ordinance repeals the former law regulating certificates of public necessity and convenience (hereinafter "certificates") and the motor vehicle for hire activities they authorized (chiefly taxicab operations). Such certificates had been transferable to others subject to the approval of the San Francisco Police Commission.

Proposition K[1] embodies certain reforms in San Francisco's regulatory scheme governing the operation of motor vehicles for hire pursuant to the City's police powers. These reforms include the setting of standards for continuous operation,[2] measures to regulate record keeping[3] and fare charges[4] and a requirement that only driver-operators may qualify as certificate holders.[5] Certificates issued pursuant to Proposition K are not transferable either expressly or by the operation of law.[6] To effectuate the intended reforms, Proposition K terminated the former regulatory scheme and all outstanding certificates.[7] To mitigate any hardship which might attend the change in the licensing system, a special provision allows those who held certificates under the former ordinance to qualify automatically for certificates under the new system.[8] It is a misdemeanor to operate a motor vehicle for hire in San Francisco without a certificate.

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[1]See the text of Proposition K which is attached as Appendix "E" to the Jurisdictional Statement of the Appellants herein.

[2]*Ibid.*, Section 4(a).

[3]*Ibid.*, Section 6.

[4]*Ibid.*, Section 7.

[5]*Ibid.*, Section 2(d), subject also to the "grandfather" provisions of Sections 2(f) and 4(b).

[6]*Ibid.*, Sections 4(a), 5 and 1.

[7]*Ibid.*, Sections 8 and 9.

[8]*Ibid.*, Section 4(b).

B. The Proceedings Below

The appellants were all bearers of certificates at the time that Proposition K was adopted. Some of the appellants have paid large sums of money to various private parties for the transfer of these certificates. Some of the appellants paid only a modest application fee to San Francisco for the original issuance of certificates in amounts as small as ten dollars.

Appellants, contending that they had "property" rights in the certificates held by them, filed separate suits in the California Superior Court to have Proposition K declared to be invalid. Appellants, in separate motions in the various Superior Court proceedings, sought preliminary injunctions against the enforcement of Proposition K. These motions were denied. The appellants thereupon filed separate petitions for writs of mandate before the California Court of Appeal, First Appellate District. These petitions were summarily denied. Appellants then separately petitioned for hearings before the California Supreme Court. That court ordered these matters remanded to the Court of Appeal for hearing. There, the actions were consolidated for hearing and the matter was fully briefed and oral argument was heard. The Court of Appeal then denied the petitions of the appellants on the merits. The written opinion of the California Court of Appeal is reported at 90 Cal.App.3d 107 (1979). Appellants thereafter filed petitions for hearing in the California Supreme Court. These petitions were denied and the instant appeal was thereafter timely filed.

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT

A case presents no substantial federal question when an interest in dispute is one created by state law pursuant to the police power and the statute or ordinance creates neither a "contract" nor a "property interest." *Bishop v. Wood,* 426 U.S. 341 (1976); *San Diego Building Contractors Association v. City Council of San Diego,* 13 Cal.3d 205 (1974), appeal dismissed for want of a substantial federal question at 427 U.S. 901.

In *Bishop, supra,* the Court reviewed a claim involving an alleged property interest in the plaintiff's public employment as a policeman. In referring to the manner of determining the nature of the plaintiff's interest, the Court stated at 426 U.S. 344 that,

> "the sufficiency of the claim of entitlement must be decided by reference to *state* law" (emphasis added).

At this point, the Court referred to a footnote in which, citing *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972), the Court reiterated that,

> "'Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.'"

This Court has repeatedly held that there can be no expectation in the continuance of a statutory regulatory

scheme. *Home Building & Loan Association v. Blaisdell,* 290 U.S. at 439-430 (1934); *Veix v. Sixth Ward Building and Loan Association, etc.,* 310 U.S. 32 (1940); *San Diego Building Contractors Association v. City Council of San Diego,* 13 Cal.3d 205 (1974), appeal denied for want of a substantial federal question at 427 U.S. 901.

The well settled rule of California law is that certificates of public necessity and convenience, and other permits or licenses granted pursuant to the police power do not create vested rights and are not contracts. *Rosenblatt v. California State Board of Pharmacy,* 69 Cal.App.2d 69, 73 (1945); *Teachout v. Bogy,* 175 Cal. 481 (1917); *Luxor Cab Co. v. Cahill, et al.,* 21 Cal.App.3d 551 (1971); *Subriar v. City of Bakersfield,* 59 Cal.App. 175 (1976). See also *Hurtado v. California,* 110 U.S. 516 (1884); *People v. McCloskey,* 76 Cal.App. 227, 230 (1926). This is particularly true where the regulated activity involves the commercial use of the streets. *People v. Galena,* 24 Cal.App.2d 770, 775 (1938); *Subriar, supra; People v. McCloskey, supra; Luxor Cab Co. v. Cahill, supra.*

CONCLUSION

Wherefore, Appellees respectfully submit that the questions upon which this cause depends are so unsubstantial as not to require further argument, and Appellees respectfully move the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in this cause by the California Court of Appeal, First Appellate District.

Respectfully submitted,

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August 20, 1979

Supreme Court, U. S.
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APPELLANTS' REPLY TO MOTION TO DISMISS OR AFFIRM

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September, 1979

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SUPREME COURT OF THE UNITED STATES

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APPELLANTS' REPLY TO MOTION TO DISMISS OR AFFIRM

San Francisco argues that "there can be no expectation in the continuance of a statutory regulation scheme." Motion to Dismiss at 4-5. That identical argument was made and rejected in *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95 (1938). In that case, a teacher with life tenure under a state statute was dismissed after the tenure law was repealed. The school authorities "urge[d] that every contract is subject to the police power and that in repealing the Teachers' Tenure Act the legislature validly exercised that reserved power of the state." *Id.* at 107. The Court disagreed. Noting that under the tenure statute teachers could be dismissed on a variety of expressly stated grounds or for any other "good and just cause," the Court did not hesitate to hold that a contract was impaired by

the State's action and, indeed, held that even after a weighing of interests that action could not be sustained:

> "Our decisions recognize that every contract is made subject to the implied condition that its fulfillment may be frustrated by a proper exercise of the police power but we have repeatedly said that, in order to have this effect, the exercise of the power must be for an end which is in fact public and the means adopted must be reasonably adapted to that end . . . . The causes of cancellation provided in the Act of 1927 . . . are persuasive that the repeal of the [tenure statute] was not an exercise of the police power for the attainment of ends to which its exercise may properly be directed." (*Id.* at 108-09).

Legislatures therefore do not have the unfettered right to impair "contract" rights created by statute by the simple expedient of repealing the statute. *See also United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977) (repeal of statutory covenant impaired obligations of contract)[1]; Jur. Statement at 10-11 n. 10 and cases cited.

The other basis for Appellees' motion to dismiss is this assertion:

> "The well settled rule of California law is that a certificate of public necessity and convenience, and other permits or licenses granted pursuant to the police power, do not create vested rights and are not contracts." (Motion to Dismiss or Affirm at 5).

[1] In *United States Trust*, the Court said:

> "In general, a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractural nature enforceable against the State." (431 U.S. at 17 n. 14).

San Francisco does not deny that prior to Proposition K, a permit holder had the right "enforceable against the state" to transfer the permit and to hold it free of revocation except for proven cause.

If San Francisco means to say only that the California courts view San Francisco's taxicab permits as not entitled to Contract Clause or Due Process protection, we agree; that is why we are here. But that is nothing more than a view of the ultimate federal questions which this Court is asked to decide. Federal constitutional rights under the Contract and Due Process Clauses do indeed turn on the underlying "rules or understandings" as established by state law[2], but federal rights surely are neither created nor destroyed by the labels the state chooses to use. San Francisco does not escape the modest strictures of the Constitution by a conclusory declaration, by itself or by the courts of California, that taxicab permits are neither "contracts" nor "property." *See Coombs* v. *Getz*, 285 U.S. 434, 441 (1932).

Happily, the federal questions in this case are not blurred by uncertainties over the incidents of the taxicab permits prior to the passage of Proposition K or over any aspect of California or municipal law. San Francisco does not argue that the California courts have rendered an interpretation of *state or local* law which defines the rights of permit holders in such a way as to exclude them from the protection of the Contract and Due Process Clauses. No questions of interpretation are presented. The state and local law characteristics of Appellants' taxicab permits are undisputed.

San Francisco made a formal commitment, expressed in its ordinances, to the holders of taxicab permits. San Francisco has never denied that, prior to Proposition K, taxicab permits

[2]

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

Board of Regents v. *Roth*, 408 U.S. 564, 577 (1972); *see also Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 9 (1978); *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95-100 (1938).

were freely transferable and irrevocable except for proven cause. Its Police Code unambiguously provided that permits would be *irrevocable* except for proven cause and *transferable* to qualified transferees. §§ 1079, 1130. It did not hedge that commitment by warning that the ordinances conferring irrevocability and transferability might be revoked at any moment. No California court has ever held otherwise or even suggested that the Police Code did not mean what it said. *Compare Bishop* v. *Wood*, 426 U.S. 341, 344-46 (1976).[3]

The following observations of Professor Tribe are therefore entirely to the point:

> "[A]s Justice Story's concurring opinion in *Dartmouth College* had warned, the states remained free to reserve in their contracts and even in their constitutions the power to change their minds. Legislatures were therefore liberated to be as openly unreliable as they pleased in their dealings with the people.

[3] The statements in the text above are quickly confirmed by an examination of the California cases cited by San Francisco. The only cases having anything to do with taxicab permits or the applicable provisions of the Police Code are *Luxor Cab Co.* v. *Cahill*, 21 Cal. App. 3d 551, 98 Cal. Rptr. 576 (1971) and *People* v. *Galena*, 24 Cal. App. 2d 770, 70 P. 2d 724 (1937). Those cases are wholly irrelevant. *Luxor* involved a challenge by holders of taxicab permits to the issuance by San Francisco of additional permits. The court held that no vested rights of existing holders were infringed by the issuance of additional permits. It quoted the relevant provisions of the Police Code, pursuant to which the challengers' permits had been issued, which expressly authorized the issuance of additional permits under certain circumstances. Obviously, there had been no promise—contractual or otherwise—to issue no additional permits. *People* v. *Galena*, *supra*, merely upheld San Francisco's right to establish exclusive taxicab stands (*See City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976)); as in *Luxor* (and unlike this case), there had been no prior contractual promise to the contrary. Nothing in either case purported to interpret the sections of the Police Code at issue here or to discuss the Code's promise that permits would be irrevocable and transferable; indeed, those cases had nothing whatever to do with the issues of irrevocability or transferability of permits.

> "The catch is that, for a variety of reasons, legislatures may not 'please' to be all that openly unreliable; they often prefer to decline the invitation extended in 1819 by Justice Story—the invitation to warn all who would deal with them that their word may well prove worthless. For its own purposes, a government may find it convenient, sometimes indeed imperative, to signal its trustworthiness and thus to induce the sort of reliance that it could instead have spurned. When government makes that choice, a powerful argument may be advanced that the most basic purposes of the impairment clause, as well as notions of fairness that transcend the clause itself, point to a simple constitutional principle: *government must keep its word.*" (Tribe, AMERICAN CONSTITUTIONAL LAW 470 (1978) (emphasis in original)).

Accordingly, San Francisco's unequivocal promises that Appellants' permits would be transferable and irrevocable except for proven cause created both "contract" and "property" rights protected by the Constitution.

This disposes of the *only* defenses tendered by San Francisco. As previously indicated (*see* Jur. Statement at 16), San Francisco does *not* defend Proposition K on the basis that constitutionally sufficient governmental interests justify the impairment of Appellants' permit rights. For reasons developed in the Jurisdictional Statement (at 16-23), such an argument could not plausably be advanced in this case.

The substantiality of the constitutional questions presented is therefore established, and probable jurisdiction should be noted.

September, 1979

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